2006

State of Utah v. Darrell Dean Anderson : Brief of Appellant

Utah Court of Appeals

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Merlin G. Calver; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellant,	:	Case No. 20060099-CA
v.	:	
DARRELL DEAN ANDERSON	:	
Defendant/Appellee.	:	

BRIEF OF APPELLANT

APPEAL FROM A SENTENCE IMPOSED FOR CONVICTIONS OF SIMPLE ASSAULT, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 76-5-102 (WEST 2004), AND VIOLATION OF A PROTECTIVE ORDER, A CLASS A MISDEMEANOR IN VIOLATION OF UTAH CODE ANN. § 76-5-108 (WEST 2004), IN THE SECOND JUDICIAL DISTRICT COURT IN AND FOR WEBER COUNTY, THE HONORABLE ROGER S. DUTSON PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from a sentence imposed for convictions of simple assault, a class A misdemeanor in violation of UTAH CODE ANN. § 76-5-102 (West 2004), and violation of a protective order, a class A misdemeanor, in violation of UTAH CODE ANN. § 76-5-108 (West 2004), in the Second Judicial District Court, in and for Weber County, the Honorable Roger S. Dutson presiding. This Court has jurisdiction of this appeal pursuant to UTAH CODE ANN. §77-18a-1(3)(d), (i) & (j) (West Supp. 2005).

ISSUE ON APPEAL AND STANDARDS OF APPELLATE REVIEW

Where the prior conviction for disorderly conduct involving domestic violence did not result from a plea agreement reducing another charge, may a sentence imposed for domestic violence crimes be enhanced with that prior conviction of disorderly conduct?

"[T]he proper interpretation of a statute is a question of law that should be reviewed for correctness." *State v. Barrett*, 2005 UT 88, ¶ 14, 127 P.3d 682.

This issue was preserved by the trial court's order denying enhancement of the charges. R395-98 (Addendum B).

STATUTES

The following statutes, dispositive of this case, are attached at Addendum A:

UTAH CODE ANN. § 30-6-1 (West 2004);
UTAH CODE ANN. § 76-5-102 (West 2004);
UTAH CODE ANN. § 76-5-108 (West 2004);
UTAH CODE ANN. § 76-9-102 (West 2004);
UTAH CODE ANN. § 77-36-1 (West 2004);
UTAH CODE ANN. § 77-36-1.1 (West 2004);
UTAH CODE ANN. § 77-36-1.1 (West Supp. 2005).

STATEMENT OF THE CASE

The State charged defendant by information in two separate cases with retaliation against a witness or informant and violation of a protective order (Case No. 031904848) and four counts of violation of a protective order and two counts of assault (Case No. 031904234), all third degree felonies. R4-7. The protective order and assault charges were enhanced from class A misdemeanors based on a prior conviction on October 3, 2002, for domestic violence disorderly conduct ("D.V. disorderly conduct")—a plea in abeyance to a disorderly conduct charge that was later entered. R4-7, 65-68, 278-79, 356, 360.

Defendant filed a motion to quash the prior conviction on the ground that it was not for domestic violence as required by the enhancing statute, UTAH CODE ANN. § 77-36-1.1

(West 2004). R51-52, 61-71. The trial court initially agreed with the defense and quashed the prior conviction, but later reversed itself. R76, 80. Defendant filed a petition for interlocutory review of this decision, which this Court denied. R135, 151.

Defendant requested, and the trial court granted, a joint jury trial. R86-90. Trial began on October 25, 2005. R280. One day before trial, the State filed an amended information alleging two counts of assault, three counts of violation of a protective order, and one count of retaliation against a witness, all third degree felonies. R1. The court took notice of the amended information and consolidated the cases into Case No. 031904234. R281. On the morning of trial, defendant filed a motion to reduce all the domestic violence counts to class A misdemeanors, again on the ground that he had no prior domestic violence convictions. R274-79. The court denied the motion. TT1:7.[1] At trial, defendant conditionally stipulated to the prior conviction being domestic violence disorderly conduct to further preserve his challenge to the court's denial of his motion. TT1:21; TT2:221. After a five-day trial, the jury found defendant guilty of one count of simple assault and one count of violation of a protective order, hung on all three counts of violation of a protective order, and acquitted defendant of one count of simple assault. R334-45.

On November 30, defendant filed another motion under UTAH CODE ANN. § 76-3-402 (West 2004) to reduce the convictions. 346-49. This time, the court ordered briefing on the

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[1] With the exception of the transcript of the preliminary hearing, none of the transcripts of the proceedings have been paginated. Trial transcripts are indicated by "TT[volume number]."

issue, specifically asking for arguments and authority relating to (1) whether the October 3, 2002 disorderly conduct conviction qualified as an enhancing domestic violence conviction under Utah Code Ann. § 77-36-1(2)(o), and (2) whether the disorderly conduct conviction qualified as a domestic violence conviction under the language used by the judge who revoked the plea in abeyance. R351-53. The court continued sentencing and set an evidentiary hearing to resolve the matter. R369-70. At the hearing, the trial court, notwithstanding some ambiguity in an earlier ruling by another judge,[2] treated the offense as "clearly" one of domestic violence (R5-6, 22, 24-26, 29-30); however, the court ruled that it could not be used for enhancement purposes because it was not reduced from a higher charge pursuant to subsection (o) of the statute. *See* January 6, 2006 Evidentiary Hearing ("EH") at 28, 29, 30; R395-98 (Order Denying Enhancement of Charges, "Order") (Addendum B). Accordingly, the trial court reduced the convictions to class A misdemeanors. R398; 400-01; EH:29.

Defendant was sentenced on January 23, 2006 to two consecutive terms of 365 days, with credit for time served. R401. In ordering consecutive sentences, the trial court expressed that it was "very, very concerned," that "the facts . . . show a very substantial

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[2] Judge Stanton Taylor presided at the October 3, 2002 proceedings in which defendant originally entered a plea of abeyance to the prior offense disorderly conduct. R67-68, 277-78. Following a violation of probation for this offense, Judge Baldwin presided revoked the plea in abeyance on November 20, 2003, but did not explicitly state that the plea had been to a domestic violence disorderly conduct offense. R277-78; TT1:7 ("[The offense] is what it is.")

continuing pattern of conduct that is far more extreme and involved than the standard types of protective order violations," and that defendant was a "very dangerous person." Sentencing Transcript (ST) at 8-9. The State filed its notice of appeal the same day. R402. Defendant requested an extension to file a cross appeal on February 22, 2006—which the trial court granted—and he filed his notice of appeal on March 14, 2006. R517-23.

STATEMENT OF FACTS[3]

On August 3, 2003, Leslie Anderson, her husband (defendant), and their one-year-old daughter Jayden set out to attend a family party in South Ogden. TT1:66. Leslie was driving, and she and defendant were continuing an argument that had begun earlier and had been "ongoing . . . all day." TT1:67. When Leslie sought to diffuse the situation for Jayden's sake, defendant began to yell. TT1:68. Leslie then tried to get him to leave the car, but defendant refused. TT1:69. After continuing down the road, defendant became "very angry," repeatedly shoved Leslie against the car door, and grabbed the steering wheel and swerved into oncoming traffic. TT1:69. Rather than continue to the party, Leslie turned the car around and went home. TT1:69. Leslie was three months pregnant with the couple's second child at the time. TT1:69-70, 73, 88.

The abuse did not stop when they arrived back home. Leslie took Jayden into the house, first upstairs, then downstairs in attempts to escape defendant, but defendant followed

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[3] Except as otherwise noted, this brief recites the facts in the light most favorable to the jury's verdict. *See State v. Litherland*, 2000 UT 76, ¶ 2, 12 P.3d 92.

them. TT1:76-78. When he caught up with them downstairs, defendant shoved Leslie, who had one-year-old Jayden on her hip, into the wall five or six times. TT1:79-81. Eventually, she was able to get away and barricade herself and her daughter in the upstairs bedroom. TT1:87-88. Defendant yelled through the door to his pregnant wife that she had three days to get herself and "all her sh–t" out of the house. TT1:89. Leslie's back later hurt so much she had to get a prescription for the pain, but she didn't think of the episode as domestic violence because she wasn't "half dead in a hospital, black and blue, bloody." TT1:84, 86. Consequently, she did not report it to police at the time. TT1:86. This was not the first time that defendant had become physically combative, however: he previously had an altercation with Leslie's father resulting in the October 3, 2002 conviction for domestic violence disorderly conduct, which counsel stipulated to at trial. TT2:220-21.

The next day, Leslie, accompanied by her mother, obtained an ex parte protective order, applicable against defendant both at her home and at her parents' home. TT1:94-96; TT2:151, 373-74. Defendant later arrived at Leslie's house and barged his way through the front door, hitting Leslie in the stomach with the doorknob and pinning her against the wall. TT2:223-24, 282-83; Preliminary Hearing (PH) at 23-24. While defendant frantically began to gather up food and other items to take with him, Leslie called the police, who arrived a short time later to serve the protective order. TT2:262-63; PH:30-31.

A little more than a month later, on September 16, Leslie's parents found an unstamped, folded letter in their mailbox which threatened Leslie and her children. TT2:158-

59, 165, 301. They called the police, who took the letter, which had been made from newspaper or magazine clippings. TT2:373, 378; TT3:523, 568. Officers later executed a search warrant at defendant's parents' house and found latex gloves, cut newspaper or auto directories, scissors, and glue. TT3:424-25, 429. A crime scene investigator later found letters cut out of the papers to be consistent with the cutouts in the letter. TT3:457-86.

SUMMARY OF ARGUMENT

The trial court erred in is refusing to enhance the charges in this case, because the plain language of the domestic violence enhancement statutes signifies that a prior conviction for disorderly conduct characterized as domestic violence is sufficient to enhance a subsequent domestic violence conviction.

ARGUMENT

THE PLAIN, BROAD LANGUAGE OF §§ 77-36-1 AND 77-36-1.1 SUPPORTS THE PROPOSITION THAT A FINDING OF A PRIOR DOMESTIC VIOLENCE OFFENSE REQUIRES ENHANCEMENT, WITHOUT REGARD TO WHETHER THE OFFENSE IS REDUCED FROM A GREATER CHARGE OR IS SPECIFICALLY ENUMERATED IN THE STATUTES

Defendant was convicted of misdemeanor domestic violence offenses. Utah law directs that those convictions should have been enhanced because defendant had previously been convicted of disorderly conduct, a qualifying domestic violence offense under facts found by the trial court. However, because the trial court improperly read a requirement into the statute, it illegally failed to enhance defendant's sentences as the prosecution requested.

A. Utah law directs the enhancement of qualifying domestic violence offenses .

A conviction for a domestic violence offense may be enhanced one degree if the offender is convicted of a misdemeanor domestic violence offense within five years of the prior conviction. *See* UTAH CODE ANN. § 77-36-1.1 (West 2004).[4] UTAH CODE ANN. § 77-36-1(2) (West 2004) generally defines domestic violence as "any criminal offense involving violence or physical harm or threat of violence or physical harm . . . when committed by one cohabitant against another." Section 77-36-1(2)(o) adds that it is "also" domestic violence "if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses described in this Subsection (2);" that is, in addition to the general definition, the statute "also" includes a number of enumerated offenses from simple assault and violation of a protective order to

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[4] The 2004 version of section 77-36-1.1, applicable at the time of the offense in this case, provided:

> (1) When an offender is convicted of any domestic violence offense in Utah, or is convicted in any other state, or in any district, possession, or territory of the United States, of an offense that would be a domestic violence offense under Utah law, and is within a five-year period after the conviction subsequently charged with a domestic violence offense that is a misdemeanor, the offense charged and the punishment for that subsequent offense may be enhanced by one degree above the offense and punishment otherwise provided in the statutes described in Section 77-36-1.
>
> (2) For purposes of this section, a plea in abeyance is considered a conviction.

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL

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August 16, 2006

JANET ALEXANDER
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UTAH COURT OF APPEALS
450 South State Street
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Salt Lake City, Ut 84114-0230

Re: ***State v. Darrell Dean Anderson***, Case No. 20060099-CA

ERRATA

Dear Ms. Alexander:

It has just come to my attention that, due to clerical error, the State's brief of appellant in the above named case, filed on August 11, 2006, is missing a line of text at the top of page 9. The missing line should read: . . . "criminal homicide and kidnaping. See section 77-36-1(2). The trial court concluded that the" . . .The transition from page 8 to page 9 should read: "that is, in addition to the general definition, the statute "also" includes a number of enumerated offenses from simple assault and violation of a protective order to criminal homicide and kidnaping."

I have attached copies of page 9 with the missing line added. I apologize for any inconvenience.

Sincerely,

Lee Nakamura

Lee Nakamura
Criminal Appeals Division

copy: Merlin G. Calver
Brenda J. Beaton

criminal homicide and kidnaping. *See* section 77-36-1(2). The trial court concluded that the plain language of subsection (2)(o) required that a disorderly conduct conviction had to be *reduced* from a greater offense in order to apply for enhancement purposes. *See* R397-98 (Order Denying Enhancement of Charges) (Addendum B). The trial court was mistaken.

B. The trial court failed to apply the plain language of the statute.

"The proper interpretation and application of a statute is a question of law which we review for correctness, affording no deference to the district court's legal conclusion." *State ex rel. J.H.*, 2006 UT App 205, ¶ 5, 138 P.3d 70 (citation omitted). When interpreting a statute, the reviewing court seeks to "evince the true intent and purpose of the legislature," which, absent ambiguity, is best derived from the statute's plain meaning. *State v. Maestas*, 2002 UT 23, ¶ 52, 63 P.3d 621 (additional quotation marks and citations omitted). In examining statutory plain meaning, it is the reviewing court's purpose to "render all parts [of the statute] relevant and meaningful" by "presum[ing] the legislature use[d] each term advisedly . . . according to its ordinary meaning," and to "avoid interpretations that will render portions of a statute superfluous or inoperative." *Id.*

UTAH CODE ANN. § 77-36-1(2) (West 2004) provides:

> (2) "Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:
>
> . . . .

> (o) disorderly conduct, as defined in Section 76-9-102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses otherwise described in this Subsection (2).

UTAH CODE ANN. § 77-36-1(2) (West 2004).

Subsection (2) begins with a broad general definition of domestic violence: "[*A*]*ny* criminal offense involving violence or physical harm or threat of violence or physical harm . . . when committed by one cohabitant against another." The subsection then identifies a number of offenses that "also" constitute domestic violence if committed against a cohabitant. Thus, the plain language of the statute defines a broad range of conduct constituting domestic violence, and, in ancillary fashion, identifies a number of offenses that fulfill that definition if committed against a cohabitant. Clearly, the enumeration of specific offenses is not intended to nullify the broad definition of domestic violence. Consequently, the statutory enumeration of particular offenses cannot constitute an exclusive list of domestic violence offenses. Additionally, subsection (2)(o) nowhere requires that a conviction for disorderly conduct that is the result of a plea agreement stem from a charge to a higher offense. In short, a prior conviction for disorderly conduct characterized as domestic violence, as in this case, is sufficient to enhance a subsequent domestic violence conviction, whether or not it was reduced from a higher charged statutorily enumerated offense.

Based on the plain language of the 77-36-1(2), the trial court should have enhanced defendant's convictions for assault and violation of a protective order. In fact, the court

plain language of subsection (2)(o) required that a disorderly conduct conviction had to be *reduced* from a greater offense in order to apply for enhancement purposes. *See* R397-98 (Order Denying Enhancement of Charges) (Addendum B). The trial court was mistaken.

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Based on the plain language of the 77-36-1(2), the trial court should have enhanced defendant's convictions for assault and violation of a protective order. In fact, the court

found and the record supports all of the predicate *facts* necessary under the plain language of sections 77-36-1 and 77-36-1.1 to enhance defendant's conviction for assault and violation of a protective order: (1) defendant was charged with domestic violence disorderly conduct (R65, 395); (2) defendant entered a plea of no contest to a charge of disorderly conduct on October 3, 2002, which was held in abeyance (R67-68, 276-77, 395);[5] (3) this conviction "clearly" involved domestic violence (EH:5-6, 22, 24-26, 29-30; R395-96); (4) this domestic violence was against Leslie's father, a cohabitant under the law (PH: 4-7; R395);[6] (5) defendant violated the plea agreement and a conviction was entered on November 20, 2003 (R278-79, 395); and (6) on January 23, 2006, defendant was convicted of two domestic violence offenses—assault and violation of a protective order—both unenhanced class A misdemeanors (R395, 400).[7] In short, a plain reading of the statutes dictated enhancement of defendant's convictions for assault and violation of a protective order.

Nevertheless, the trial court ruled that defendant's October 3, 2002 conviction for disorderly conduct was not a qualifying domestic violence offense for enhancement purposes.

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[5] The entry of the plea in abeyance is a "conviction" under section 77-36-1.1(2). *Supra* n.4.

[6] A cohabitant is defined as ". . . a person who is 16 years of age or older who: . . . (c) is related by blood or marriage to the other party." UTAH CODE ANN. §§ 30-6-1(c) (West 2004).

[7] Assault and violation of a protective order are both enumerated domestic violence offenses. *See* subsections 77-36-1(2)(a) & (k). Both offenses are class A misdemeanors subject to enhancement. *See* UTAH CODE ANN. § 76-5-102 (3) (West 2004); UTAH CODE ANN. § 76-5-108(1) & (2) (West 2004).

The court noted that "the statute clearly states that the 'disorderly conduct' offense must be '*the result of a plea agreement in which the defendant was originally charged with . . .*' any of the enumerated offenses within the statute." R397 (emphasis in Order) (quoting section 77-36-1(2)(o)). The court apparently concluded that the quoted language required that a qualifying conviction must stem from a plea agreement that "*reduced* [the disorderly conduct conviction] down from an a higher charged offense." *Id.* (emphasis added).

The trial court made several analytic errors. First, as stated, the plain language of section 77-36-1 (2)(o) contains no requirement that a qualifying disorderly conduct conviction must stem from a plea agreement that "reduced [it] down" from an a higher charge. Indeed, the clear implication of the enhancement statute, section 77-36-1.1, taken as a whole, rebuts the trial court's ad hoc requirement. Section 77-36-1.1(2) (West 2004), applicable at the time defendant's plea to disorderly conduct was held in abeyance, provides that, "[f]or the purposes of this section, a plea in abeyance is considered a conviction." The statute plainly embraces the common practice of plea bargaining in which, as an alternative to a conviction to a reduced charge, the trial court accepts a plea to the original charge at the original degree of penalty and holds it in abeyance in expectation that it will be dismissed upon successful completion of the agreement. The legislature clarified this implication when, in 2005, it amended section 77-36-1.1 to read that a "plea held in abeyance, . . . is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed

in accordance with the plea in abeyance agreement."[8] The phrase, "even if the charge has been subsequently reduced," plainly implies the statute's recognition of the opposite condition: pleas held in abeyance which have *not* been reduced. Thus, the trial court's reasoning disregards a basic tenet of statutory construction: Statutes are to be read to "render all parts [of the statute] relevant and meaningful." *See Maestas*, 2002 UT 23, ¶ 52.

Second, as stated, adopting the trial court's reasoning renders the more general definition of domestic violence in section (2) "superfluous" and "inoperative," because the court's reasoning limits qualifying offenses for enhancement purposes only to "the enumerated offenses within the statute." *See* Order, R397 (analyzing section 77-36-1(2)). Subsection (2), merely sets out a non-exclusive list of qualifying domestic violence offenses.

Here, the trial court correctly ruled that defendant's conduct in the disorderly conduct incident constituted domestic violence, a finding the State does not challenge on appeal. EH:5-6, 22, 24-26, 29-30; R395-96. The record, albeit less than complete, supports the trial court's finding. *See* TT2:221 (Leslie testifying briefly about the fight, in which defendant started by bumping her father with his chest); PH at 4-7 (defense counsel representing the

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[8] The 2005 amended, renumbered section 77-36-1.1(2) provides:

> (3) For purposes of this section, a plea of guilty or no contest to any qualifying domestic violence offense in Utah which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

UTAH CODE ANN. § 77-36-1.1 (3)(West Supp. 2005).

situation as one in which "the father-in-law and the son[-in-law] get in a fight, the son[-in-law] leaves and calls the police because of an assault"). *See also* PH at 7 (defendant's admission); EH at 26, 28, 29, 30 (trial court describing prior offense). Thus, defendant's conduct in this prior matter constituted domestic violence because he "engag[ed] in fighting or violent, tumultuous, or threatening behavior" with a cohabitant (a person "related by . . . marriage" to the defendant, his father-in-law). UTAH CODE ANN. § 76-9-102(1)(b)(i)(West 2004); UTAH CODE ANN. § 30-6-1 (2) (West 2004). Section 77-36-1requires nothing more. Once the trial judge determined that the prior crime was one of domestic violence, he was without authority to reduce the charges. As a result of this unwarranted reduction, the trial court imposed illegal, lower sentences. R398, 400-01.

Finally, reading the statute to mean that only the specifically enumerated offenses set out in section 77-36-1 qualify as domestic violence offenses leads to absurd results. Consider, for example, another specific offense listed in the very next subsection, (p): child abuse. The code section cited to defines child abuse for purposes of that portion of the enhancement statute as abuse committed in the presence of a minor. *See* UTAH CODE ANN. §§ 77-36-1(2)(p) and 76-5-109.1. But applying the trial court's logic to a hypothetical case involving a prior conviction for child abuse under section 76-5-109 would preclude enhancement of the later offense under section 77-36-1. The legislature could not have intended that the meaning of "child abuse" for purposes of the enhancement statute be confined to the much less serious offense of abuse committed in the presence of a child and

exclude actual abuse of a defendant's own child. The same logic would apply to section 76-5-110 regarding abuse or neglect of a disabled child.[9]

Likewise, the legislature could not have intended to exclude incidents of disorderly conduct which clearly fall under the general definition of "domestic violence," merely because they chose to be explicit regarding cases which are reduced from other enumerated charges under section (2). The statute merely presents two options regarding enhanceable convictions of disorderly conduct: they can result from 1) an original charge characterized as domestic violence (as in this case), or 2) a reduction pursuant to a plea agreement which does not characterize the conduct as domestic violence, but is in lieu of a more serious domestic violence offense, enumerated or not. The language of subsection (o) thus evinces an intent to broaden, not restrict, the enhancement of subsequent offenses. It adds a class of disorderly conduct to the statute that would not otherwise warrant enhancement, which prevents domestic violence offenders from avoiding the consequences of their actions. An

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[9] Similarly, the trial court's interpretation would exclude enhancements for offenses such as abuse, neglect, or exploitation of a vulnerable adult under UTAH CODE ANN. § 76-5-111 (West 2004), reckless endangerment under UTAH CODE ANN. § 76-5-112 (West 2004), and endangerment of a child or elderly adult UTAH CODE ANN. 76-5-112.5 (West 2004), even when committed against a cohabitant. The absence of these offenses, clearly implicated in cases of domestic violence, further attests that the list of qualifying offenses in section 77-36-1 is non-exclusive. Indeed, the trial court recognized the seeming absurdity of its interpretation of the statute when it stated that "ironically, those [higher] enumerated offenses includes [sic] an 'attempt' to commit those offenses, several of which, if charged as an 'attempt' to commit those offenses, would also be a class a class C misdemeanor, the same level of offense as disorderly conduct-domestic violence." R397. In other words, the court recognized that its interpretation of the statute conflicted with its plain meaning.

offender thus cannot avoid enhancement merely by entering into a plea agreement resulting in a conviction that does not rise to the true level of his misbehavior.

In sum, the trial court misinterpreted sections 77-36-1 and 77-36-1.1 by insisting that a qualifying offense be reduced offense from only those specifically enumerated offenses in section 77-36-1.

CONCLUSION

Based on the foregoing discussion, the State respectfully requests that defendant's convictions be affirmed.

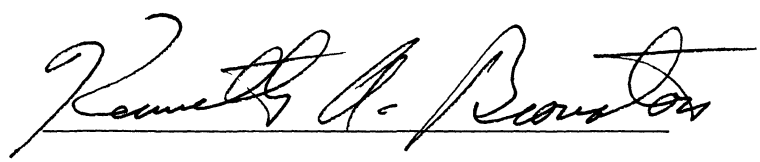
RESPECTFULLY SUBMITTED this 11th day of August, 2006

MARK L. SHURTLEFF
Attorney General

KENNETH A. BRONSTON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellant were mailed, postage prepaid, to Merlin G. Calver, attorney for defendant, 234 24th St., Ogden, Utah 84401-1403, this 11th of August, 2006



Addenda

Addendum A

§ 30-6-1. Definitions

As used in this chapter:

(1) "Abuse" means intentionally or knowingly causing or attempting to cause a cohabitant physical harm or intentionally or knowingly placing a cohabitant in reasonable fear of imminent physical harm.

(2) "Cohabitant" means an emancipated person pursuant to Section 15-2-1 or a person who is 16 years of age or older who:

(a) is or was a spouse of the other party;

(b) is or was living as if a spouse of the other party;

(c) is related by blood or marriage to the other party;

(d) has one or more children in common with the other party;

(e) is the biological parent of the other party's unborn child; or

(f) resides or has resided in the same residence as the other party.

(3) Notwithstanding Subsection (2), "cohabitant" does not include:

(a) the relationship of natural parent, adoptive parent, or step-parent to a minor; or

(b) the relationship between natural, adoptive, step, or foster siblings who are under 18 years of age.

(4) "Court clerk" means a district court clerk.

(5) "Domestic violence" means the same as that term is defined in Section 77-36-1.

(6) "Ex parte protective order" means an order issued without notice to the defendant in accordance with this chapter.

(7) "Foreign protective order" means a protective order issued by another state, territory, or possession of the United States, tribal lands of the United States, the Commonwealth of Puerto Rico, or the District of Columbia which shall be given full faith and credit in Utah, if the protective order is similar to a protective order issued in compliance with Title 30, Chapter 6, Cohabitant Abuse Act, or Title 77, Chapter 36, Cohabitant Abuse Procedures Act, and includes the following requirements:

(a) the requirements of due process were met by the issuing court, including subject matter and personal jurisdiction;

(b) the respondent received reasonable notice; and

(c) the respondent had an opportunity for a hearing regarding the protective order.

(8) "Law enforcement unit" or "law enforcement agency" means any public agency having general police power and charged with making arrests in connection with enforcement of the criminal statutes and ordinances of this state or any political subdivision.

(9) "Peace officer" means those persons specified in Title 53, Chapter 13, Peace Officer Classifications.

(10) "Protective order" means an order issued pursuant to this chapter subsequent to a hearing on the petition, of which the petitioner and respondent have been given notice in accordance with this chapter.

§ 76–5–102. Assault

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Laws 1974, c. 32, § 38; Laws 1989, c. 51, § 1; Laws 1991, c. 75, § 3; Laws 1995, c. 291, § 4, eff. May 1, 1995; Laws 1996, c. 140, § 1, eff. April 29, 1996; Laws 2000, c. 170, § 2, eff. May 1, 2000; Laws 2003, c. 109, § 1, eff. May 5, 2003.

§ 76-5-108. Protective orders restraining abuse of another—Violation

(1) Any person who is the respondent or defendant subject to a protective order, child protective order, ex parte protective order, or ex parte child protective order issued under Title 30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a, Juvenile Court Act of 1996, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally or knowingly violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

§ 76–9–102. Disorderly conduct

(1) A person is guilty of disorderly conduct if:

(a) he refuses to comply with the lawful order of the police to move from a public place, or knowingly creates a hazardous or physically offensive condition, by any act which serves no legitimate purpose; or

(b) intending to cause public inconvenience, annoyance, or alarm, or recklessly creating a risk thereof, he:

(i) engages in fighting or in violent, tumultuous, or threatening behavior;

(ii) makes unreasonable noises in a public place;

(iii) makes unreasonable noises in a private place which can be heard in a public place; or

(iv) obstructs vehicular or pedestrian traffic.

(2) "Public place," for the purpose of this section, means any place to which the public or a substantial group of the public has access and includes but is not limited to streets, highways, and the common areas of schools, hospitals, apartment houses, office buildings, transport facilities, and shops.

(3) Disorderly conduct is a class C misdemeanor if the offense continues after a request by a person to desist. Otherwise it is an infraction.

§ 77–36–1. Definitions

As used in this chapter:

(1) "Cohabitant" has the same meaning as in Section 30–6–1.

(2) "Domestic violence" means any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit a criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:

(a) aggravated assault, as described in Section 76–5–103;

(b) assault, as described in Section 76–5–102;

(c) criminal homicide, as described in Section 76–5–201;

(d) harassment, as described in Section 76–5–106;

(e) telephone harassment, as described in Section 76–9–201;

(f) kidnaping, child kidnaping, or aggravated kidnaping, as described in Sections 76–5–301, 76–5–301.1, and 76–5–302;

(g) mayhem, as described in Section 76–5–105;

(h) sexual offenses, as described in Title 76, Chapter 5, Part 4, and Title 76, Chapter 5a;

(i) stalking, as described in Section 76–5–106.5;

(j) unlawful detention, as described in Section 76–5–304;

(k) violation of a protective order or ex parte protective order, as described in Section 76–5–108;

(*l*) any offense against property described in Title 76, Chapter 6, Part 1, 2, or 3;

(m) possession of a deadly weapon with intent to assault, as described in Section 76–10–507;

(n) discharge of a firearm from a vehicle, near a highway, or in the direction of any person, building, or vehicle, as described in Section 76–10–508;

(*o*) disorderly conduct, as defined in Section 76–9–102, if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charged with any of the domestic violence offenses otherwise described in this Subsection (2). Conviction of disorderly conduct as a domestic violence offense, in the manner described in this Subsection (2)(*o*), does not constitute a misdemeanor crime of domestic violence under 18 U.S.C. Section 921, and is exempt from the provisions of the federal Firearms Act, 18 U.S.C. Section 921 et seq.; or

(p) child abuse as described in Section 76–5–109.1.

(3) "Victim" means a cohabitant who has been subjected to domestic violence.

§ 77–36–1.1. Enhancement of offense and penalty for subsequent domestic violence offenses

(1) When an offender is convicted of any domestic violence offense in Utah, or is convicted in any other state, or in any district, possession, or territory of the United States, of an offense that would be a domestic violence offense under Utah law, and is within a five-year period after the conviction subsequently charged with a domestic violence offense that is a misdemeanor, the offense charged and the punishment for that subsequent offense may be enhanced by one degree above the offense and punishment otherwise provided in the statutes described in Section 77–36–1.

(2) For purposes of this section, a plea in abeyance is considered a conviction.

Laws 1995, c. 300, § 17, eff. July 1, 1995; Laws 1996, c. 244, § 10, eff. April 29, 1996; Laws 1999, c. 296, § 1, eff. May 3, 1999.

§ 77-36-1.1. Enhancement of offense and penalty for subsequent domestic violence offenses

(1) For purposes of this section, "qualifying domestic violence offense" means:

(a) a domestic violence offense in Utah; or

(b) an offense in any other state, or in any district, possession, or territory of the United States, that would be a domestic violence offense under Utah law.

(2) A person who is convicted of a domestic violence offense is:

(a) guilty of a class B misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class C misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense;

(b) guilty of a class A misdemeanor if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class B misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense; or

(c) guilty of a felony of the third degree if:

(i) the domestic violence offense described in this Subsection (2) is designated by law as a class A misdemeanor; and

(ii)(A) the domestic violence offense described in this Subsection (2) is committed within five years after the person is convicted of a qualifying domestic violence offense; or

(B) the person is convicted of the domestic violence offense described in this Subsection (2) within five years after the person is convicted of a qualifying domestic violence offense.

(3) For purposes of this section, a plea of guilty or no contest to any qualifying domestic violence offense in Utah which plea is held in abeyance under Title 77, Chapter 2a, Pleas in Abeyance, is the equivalent of a conviction, even if the charge has been subsequently reduced or dismissed in accordance with the plea in abeyance agreement.

Addendum B

IN THE SECOND JUDICIAL DISTRICT COURT, STATE OF UTAH
WEBER COUNTY, OGDEN DEPARTMENT

STATE OF UTAH, Plaintiff, **vs.** DARRELL DEAN ANDERSON, Defendant.	**ORDER DENYING ENHANCEMENT OF CHARGES** Case No. 031904234 FS Honorable Roger S. Dutson JAN 09 2006

FACTS

Defendant Anderson was tried and convicted by jury of two Third Degree Felonies, Domestic Violence Assault and Violation of a Protective Order. Defendant filed appropriate Motions to have the cases tried as Class A Misdemeanors and argued that the State should not be allowed to use a Disorderly Conduct conviction to enhance the Class A Misdemeanors one level to Third Degree Felonies.

The Defendant pled no contest to a charge of Domestic Violence Disorderly Conduct which plea was initially held in abeyance by Judge Taylor on October 3, 2002 and later entered as a conviction on November 20, 2003 by Judge Baldwin. There had been no other Domestic Violence convictions or charges filed against the Defendant and the Disorderly Conduct was not a reduction from any other charge. After a full review of the transcripts of pleadings the record shows that there was a dispute between the defendant and his father-in-law (the present victim's father) that gave rise to this earlier charge. Based on all the facts of that case, this Court has concluded that it was clearly

a conviction for Disorderly Conduct involving Domestic Violence. It has always been Defendant's contention that the Court should not treat that Disorderly Conduct as involving Domestic Violence as that term is defined by statute. However, Defendant's did not raise the question of whether or not, if it was a Disorderly Conduct - Domestic Violence conviction, that it still should not be considered an enhancing offense under UCA §77-36-1 (2) and UCA §77-36-1.1 (3).

Prior to sentencing, this Court directed the parties to brief the enhancement statute as it relates to this case.

UCA §77-36-1 (2) defines 'Domestic Violence' as follows:

> *Any criminal offense involving violence or physical harm or threat of violence or physical harm, or any attempt, conspiracy, or solicitation to commit criminal offense involving violence or physical harm, when committed by one cohabitant against another. "Domestic violence" also means commission or attempt to commit, any of the following offenses by one cohabitant against another:*
>
> [The statute then lists offenses from (a) through (p) including the following]
>
> *(o)* ***disorderly conduct****, as defined in Section §76-9-102,* ***if a conviction of disorderly conduct is the result of a plea agreement in which the defendant was originally charges with any of the domestic violence offenses otherwise described in this Subsection (2).*** (emphasis added) [That section then establishes an exception regarding federal firearms law]

This offense was not originally charged originally under Subsection (2).

The enhancement provisions of the law are found in UCA §77-36-1.1 which increases the offense one level higher if there has been a prior Domestic Violence conviction within five years. It describes a 'conviction' as including a 'plea in abeyance' as occurred herein.

DISCUSSION OF ENHANCEMENT STATUTE

The State very logically argues that the wording of the statute makes no common sense in requiring a 'disorderly conduct' domestic violence conviction to be reduced from one of the other

qualifying offenses where, as in this case, (1) The facts of the disorderly conduct offense are clearly included in the 'domestic violence' definitions, and (2) The case was not originally charged at a higher level and reduced down to or finally disposed of as a Disorderly Conduct-Domestic Violence. However, the intent of the legislature seems clear that is the requirement. If possible, the Court must construe the plain language of the statute. The sole issue is whether the disorderly conduct conviction or plea in abeyance comes within the enhancing language of the statute. The statute clearly states that the 'disorderly conduct' offense must be "... *the result of a plea agreement in which the defendant was originally charged with* ... " any of the enumerated offenses within the statute. That did not occur in this case.

Among those higher enumerated offenses are Class B Misdemeanor 'assault', 'harassment', and 'telephone harassment' and ironically, those enumerated offenses includes an 'attempt' to commit those offenses, several of which, if charged as an 'attempt' to commit those offenses, would also be a Class C Misdemeanor, the same level offense as disorderly conduct-domestic violence. The same result occurs by charging originally as a Class C Misdemeanor Disorderly Conduct-Domestic Violence. But, under the statute as presently adopted, even though a Disorderly Conduct-Domestic Violence offense occurs, the clear language of subsection (o), prevents this Court from considering it as an enhancing offense. This is because the legislature has quite illogically determined that disorderly conduct must be reduced down from a higher charged offense to qualify. It is certainly not consistent with what would seem to be the purpose of the enhancement statute, but that is how it is presently drafted.

CONCLUSIONS OF LAW

The Court must conclude that under the enhancement statute, a Disorderly Conduct -

Domestic Violence conviction that has not originally been charged as one of the enumerated offenses and then reduced to disorderly conduct, does not qualify to enhance the two Class A Misdemeanors to Third Degree Felonies. Therefore, those convictions should be entered as convictions of Class A Misdemeanors rather than felonies. The jury was given a stipulation that the Court had ruled on earlier that the charges could be enhanced if they found a Protective Order violation or Assault on a pregnant woman, and therefore the finding of guilty of two third degree felonies must be entered as convictions of two Class A Misdemeanors.

The jury was hung on other charges and at the hearing held before this Court on January 6, 2005, the County Prosecutor moved that this Court dismiss the additional charges and vacate the trial date which had been set.

ORDER

The Third Degree Felony Protective Order Violation is hereby entered as a Class A Misdemeanor conviction and the Third Degree Felony Assault of a pregnant woman is hereby entered as a Class A Misdemeanor conviction.

The additional charges for which the Defendant could have been retried are hereby dismissed upon motion of the County Prosecutor.

DATED this 9 day of January, 20 05.

ROGER S. DUTSON
DISTRICT COURT JUDGE